

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AUTOHOP LITIGATION

This Document Relates To:

DISH Network L.L.C., 12 Civ. 4155
(LTS)(KNF)

12 Civ. 4155 (LTS) (KNF)

DECLARATION OF DAVID SHULL
REDACTED PUBLIC FILING,
ORIGINAL FILED UNDER SEAL

I, David Shull, declare:

1. I am the Senior Vice President (“SVP”) of Programming for DISH Network L.L.C. (“DISH”). Except as otherwise stated herein, this declaration is based upon my personal knowledge, the books and records at DISH, and/or information reported up to me in the regular course of business by other individuals in the organization with personal knowledge of such facts. I can testify about the facts stated competently if called upon to do so.

2. I submit this declaration in opposition to ABC’s Motion for Preliminary Injunction.

3. DISH is the nation’s third-largest pay television provider delivering satellite services to millions of households nationwide. As of September 30, 2012, there were more than 14 million subscribers to DISH-branded direct broadcast satellite pay-TV services in the United States.

4. DISH is what is known in the industry as a “multichannel video programming distributor,” or “MVPD.” MVPDs are service providers delivering multiple channels of video programming services to customers, usually for a subscription fee. MVPDs include all cable television distributors (Comcast, TimeWarner Cable, Cox Cable) and direct broadcast satellite distributors (DirecTV, DISH) as well as certain fiber optic based delivery systems such as AT&T U-verse and Verizon FiOS.

5. **DISH has Retransmission Consent Agreements with the networks and pays substantial fees under those agreements.** I have been with DISH since October 18, 2004. I have been SVP of Programming for DISH since December 31, 2008. My principal duties as

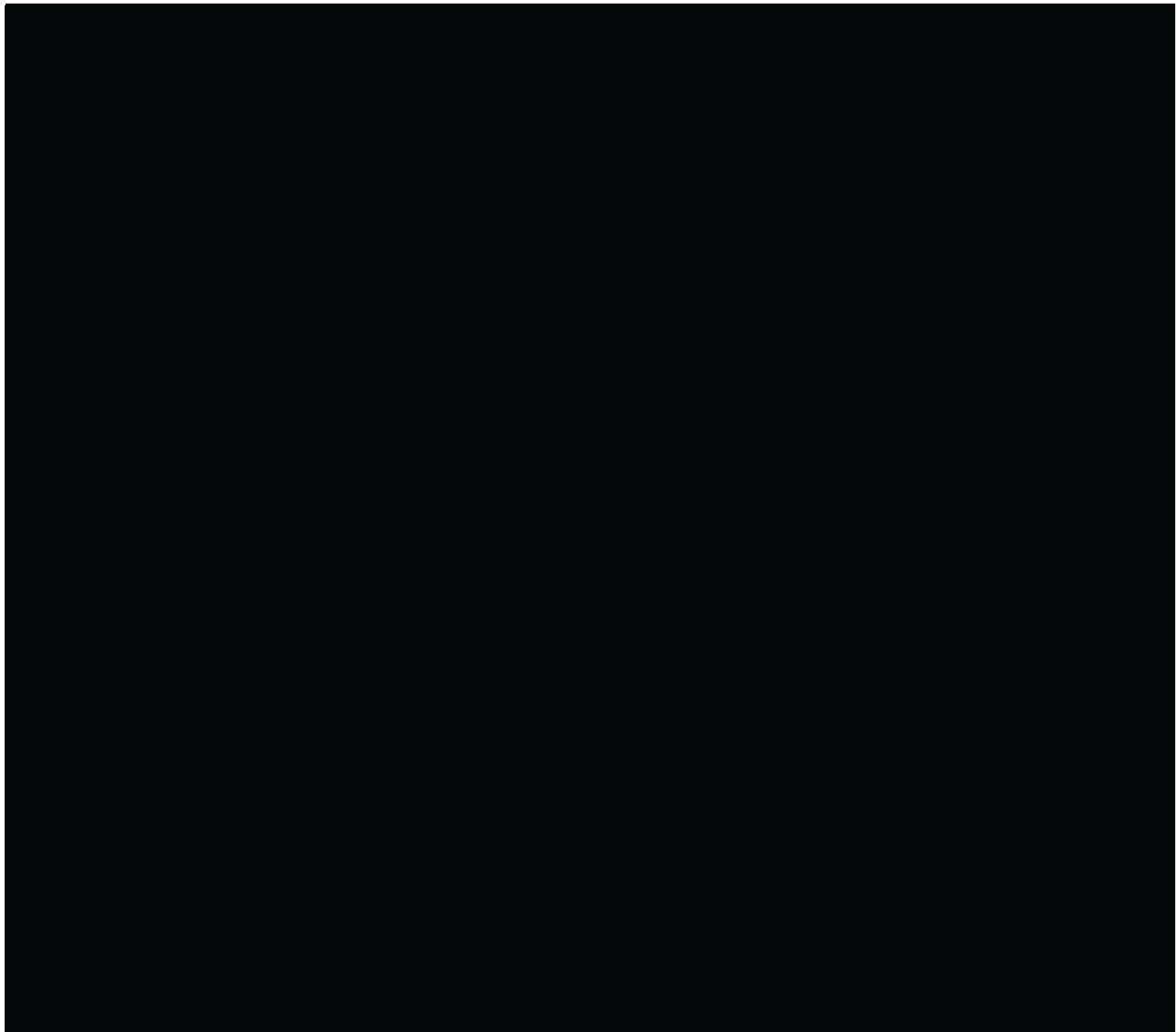
SVP of Programming include the negotiation of all major agreements for television content. In this capacity, I am responsible for negotiation of all major retransmission agreements through which DISH acquires the rights to retransmit linear television content to its pay television subscribers. This includes all “retransmission consent agreements” (“RTCs”).

6. DISH’s RTCs with over-the-air broadcast networks (e.g., ABC, CBS, NBC, Fox) are entered into pursuant to the federal Communications Act and statutory licenses in the Copyright Act whereby DISH is granted consent to pick up and retransmit those broadcasts via DISH’s direct broadcast satellite system. The United States consists of 210 markets known as “designated market areas” or DMAs, most of which have a local affiliate station for each major broadcast network. Each major broadcast television network owns and operates certain of its local affiliation stations, usually in major DMAs, such as New York City or Los Angeles. If DISH does not have an RTC with a local affiliate station in a DMA, then the viewing audience in that DMA cannot obtain its local stations over the DISH satellite service.

7. DISH is currently a party to RTC agreements with each of the four major broadcast television networks, ABC, CBS, NBC and Fox. Under these agreements, DISH pays [REDACTED] each year for the rights to retransmit the content shown on the local affiliate stations that are owned and operated by those networks.

8. I am familiar with the 2005 Digital Retransmission Consent Agreement between DISH and ABC, as I have been responsible for negotiating amendments to that agreement and for supervising DISH’s performance of that agreement in recent years. A true and correct copy of this 2005 Digital Retransmission Consent Agreement is attached hereto as Exhibit 1. This agreement was amended in 2009. A true and correct copy of the 2009 amendment is attached hereto as Exhibit 2. I am aware that ABC is claiming that it does not charge DISH any license fee for the right to retransmit ABC’s digital signal. That claim is not accurate.

9. Section 3(a) of the 2005 Digital Retransmission Consent Agreement [REDACTED]
[REDACTED]
[REDACTED]



10. At the time DISH entered into the 2005 Digital Retransmission Consent Agreement with ABC, Inc., the practice in the industry was for media conglomerates to bundle the rights to each of their different networks and channels together. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

11. **The 2005 Digital Retransmission Consent Agreement authorizes the use of DVRs.** The right for DISH subscribers to use digital video recorders (“DVRs”) is explicitly acknowledged in the 2005 Digital Retransmission Consent Agreement. Paragraph 12, which

discusses “Unauthorized Use,” states that “[DISH] shall not . . . record, copy, duplicate, retransmit, and/or authorize the recording, copying, duplication, or retransmission of any portion of any Digital Signal without the prior written consent of [ABC].” That section goes on to state, “The foregoing shall not preclude [DISH’s] practice of connecting subscribers home recording devices such as VCRs or DVRs” There is nothing in the 2005 Digital Retransmission Consent Agreement that restricts commercial skipping or requires subscribers to watch commercials.

12. The right for DISH subscribers to use DVRs is [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13. In the course of my job responsibilities at DISH, I am in regular contact with representatives of the four major broadcast television networks. I regularly meet, speak and

correspond with senior executives from each of these networks in order to negotiate agreements. I also communicate with them regularly on various and sundry other business matters involving DISH, including significant matters related to DISH's business and the implementation of the agreements. My primary contacts at ABC are David Preschlack, Executive Vice President, and Sean Bratches, Executive Vice President. No one at ABC, including Mr. Preschlack and Mr. Bratches, has ever told me that they thought that DISH was forbidden from allowing its subscribers to use DVRs. No one at ABC, including Mr. Preschlack and Mr. Bratches, has ever told me that they thought that DISH subscribers were forbidden from commercial skipping or required to watch commercials.

14. **DISH publicly announced PrimeTime Anytime and AutoHop.** The Hopper, with the PrimeTime Anytime ("PTAT") feature, was first publicly announced on January 9, 2012, with a great deal of fanfare at the annual Consumer Electronics Show ("CES"). Along with the announcement at CES, DISH distributed mock-ups of the screen shots for the PTAT feature that would inform the public of how each customer with a Hopper could enable and operate the PTAT feature. I regularly attend CES, as do representatives of the major broadcast television networks. The PTAT feature first became available to DISH subscribers with Hopper DVRs in mid-March 2012. I received no complaints about PTAT from ABC either when the Hopper was introduced in January, or later when the PTAT feature was rolled out to subscribers in March and none of ABC's representatives threatened to bring a lawsuit over PTAT.

15. The AutoHop feature was announced and first provided to our subscribers on May 10, 2012. I am aware that, on the day before the introduction of this feature, Carolyn Crawford contacted Justin Connolly, Senior Vice President, National Accounts, Affiliate Sales and Marketing, for ESPN Sales and Marketing, Inc., regarding the introduction of the AutoHop feature.

16. **PTAT is not VOD.** There are many services and devices that enable people to watch television programming "on demand." Most television viewers obtain "on demand" programming by way of the recordings that they make with their own home DVR or VCR from

the television signals received in their homes. That is, DVRs and VCRs allow viewers to watch the content that they have recorded whenever they choose, and play it back “on demand.”

17. The Hopper’s PTAT feature is a DVR recording feature enabled and operated by each individual subscriber. The PTAT feature on the Hopper is simply a more efficient way for DISH subscribers to set their DVRs to record primetime programming on certain networks. The Hopper is a whole-home DVR, meaning that the Hopper comes with up to three “Joeys,” and serves as a DVR for up to four televisions. The Hopper is capable of recording approximately 500 hours of high definition (“HD”) and 2000 hours of standard definition (“SD”) television programming. This is approximately the same amount of time that can be recorded on other DVRs on the market today. For example, the TiVO Premiere XL4 DVR is capable of recording 300 hours of HD and 2,200 hours of SD programming and enables users to record up to four HD programs at once. Thus, with TiVO’s Premiere XL4 DVR, a user could also—just by pushing a few more buttons—record all of the major broadcast television networks’ primetime programming, effectively creating the PTAT functionality. Similarly, a subscriber could use four television sets and four two-tuner DVRs, which enable the user to record two programs at once, and record all of the primetime programming on the major broadcast television networks (and still simultaneously record four additional programs). So, the PTAT function on the Hopper enables DISH subscribers to do what can be done on other DVRs—record and store, for time-shifted viewing, the networks’ primetime programming—but with a few fewer clicks of the remote control.

18. The DVR recordings that DISH customers can make with the PTAT feature on the Hopper are recordings of their local broadcast version of network primetime shows. These recordings include any local broadcast events, such as interruptions for breaking news or “crawling” information about news, weather or upcoming shows that may be displayed on the bottom portion of the broadcast video.

19. The phrase “Video on Demand” has different meanings depending on the context in which it is used. This VOD content often appears in three types of availability: (1) free video

on demand, where the user does not pay a fee to view selected content from a catalog offered by the supplier (for example a basic Hulu user); (2) transactional video on demand, where the user pays a fee to view selected content from the catalog of events offered by the supplier (for example a feature film); and (3) subscription video on demand, where the user pays a set fee per period and can watch as much content from the supplier's catalog as he or she chooses (for example NetFlix). The original content redistribution VOD model was pay-per-view movies, a form of transactional video on demand.

20. DISH also has never made available VOD content from ABC, CBS or Fox and has never made available VOD content from NBC other than once on a transactional basis. Currently, DISH has no VOD agreement with ABC or NBC, though DISH once conducted a trial of transactional VOD with NBC that involved rental of some of its primetime broadcast programming; it was extremely complicated to implement properly and there was very little demand for that service; accordingly, it was discontinued. DISH currently has VOD agreements with CBS and Fox, but is unable to implement those agreements because we cannot meet the technical conditions.

21. Unlike a DVR recording, VOD content is made available to MVPD subscribers regardless of whether an individual subscriber requested it. An MVPD subscriber does not need DVR functionality to access VOD content because VOD content is made available to multiple subscribers, regardless of the content that each individual subscriber has chosen to record on his or her set-top box using DVR functionality. A VOD service provides subscribers with "on demand" access to a catalog of content, typically hosted on a remote server, that is determined not by the subscribers, but by the MVPDs and content providers, such as ABC. Additionally, the particular programs in the VOD service are available to subscribers for "on demand" access for a period of time determined by the MVPD and content provider, not by the subscriber. The VOD content provided by the networks for on-demand viewing is separate content in the form of a standardized national version of a show. It is not a recording of the program as broadcast in the various local television markets. Therefore, VOD content does not contain breaking news

interruptions, crawling weather alerts, and the like.

22. **Any Alleged Damage From AutoHop Is Readily Quantifiable.** In addition to negotiations with the major networks, I am also involved in, or supervise individuals involved in, negotiations with local affiliates. I have supervised several negotiations between DISH and affiliates regarding, among other things, a retransmission consent agreement for DISH's retransmission of that affiliate's television signals, after the introduction of AutoHop. During the course of those negotiations, several affiliates have requested that DISH's subscribers receiving that affiliate's television signals be prohibited from using the Hopper. DISH has communicated that it would not agree to such a Hopper prohibition. Affiliates have proposed various additional fees to be included as part of the retransmission agreements, including:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]
- (d) [REDACTED]

23. The General Counsel of one affiliate has even made a public statement that DISH should expect broadcasters to expect additional compensation for subscribers using AutoHop. Attached hereto as Exhibit 7 is a true and correct copy of the article containing those comments.


24. [REDACTED]

[REDACTED]

25. **DISH respects copyrights and depends on technological innovation.** DISH respects copyrights and would not knowingly encourage anyone to do anything illegal in the infringement of copyright. As an MVPD, we depend on copyrighted content. Consumer recording for in-home private viewing at a later time is an accepted business practice and has been for at least thirty years, as have been the various mechanisms that consumers use to skip commercials during any broadcast or later viewing of network content. Innovation in DVRs is critical to our ability to compete with other MVPDs, such as Comcast and Verizon, who also offer DVRs with commercial fast-forwarding or 30-second skipping capability. We have always understood that copyright law and our contracts authorize us to market this type of technology. In marketing the Hopper, PTAT and AutoHop, we believed we were following commercially reasonable practices that allow us to serve our consumers who are paying the networks for their content and to compete more effectively with other MVPDs.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21 day of December, 2012, at Englewood, CO


A handwritten signature in blue ink, appearing to read 'David Shull', is written over a horizontal line.

David Shull

EXHIBIT 01

REDACTED
IN ITS
ENTIRETY

EXHIBIT 02

REDACTED
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EXHIBIT 03

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EXHIBIT 07

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latimes.com

Blame Drew Brees and 'Modern Family' for spat between Dish, Sinclair

By Joe Flint

12:40 PM PDT, August 14, 2012

Advertisement

Unable to come to terms on a new distribution deal, it is very likely that Sinclair Broadcast Group, the largest owner of TV stations in the United States, will pull its signals from satellite broadcaster Dish Network on Wednesday.

That means Dish subscribers in the almost 50 markets where Sinclair owns stations will be without programming from Fox, ABC, CBS, NBC and the CW Network.

Both sides are already spinning the media and their subscribers. Dish says Sinclair wants a "massive price increase" and accuses the Baltimore-based broadcaster of being greedy and adds that "higher costs will translate into higher fees for customers."

Sinclair countered that "the prices it is requesting for its extremely popular stations are substantially lower than the amounts Dish is paying for other far less popular channels."

But while the two are taking shots at each other, in an interview, Sinclair Executive Vice President and General Counsel Barry Faber named a few other culprits -- Saints quarterback Drew Brees and the cast of ABC's hit comedy "Modern Family."

Noting that Brees recently signed a five-year, \$100 million contract that will pay him \$40 million just for the upcoming season and that key cast members of the ABC hit show "Modern Family" just got big pay raises, Faber said, "we buy our programming and our costs have gone up."

That observation often gets lost in these stories because the focus is always on the broadcaster and the distributor, but there are other factors at play. When CBS, Fox and NBC agree to pay more for the NFL, they then turn to their affiliates to kick in money to help pay for it. The networks not only take most of the commercial inventory from their affiliates but also now get a big chunk of the distribution fees that pay TV operators like Dish pay to get their signals.

The solution, says Faber, is for Dish and other distributors to stop paying so much for channels that don't get the ratings that Sinclair stations pull in. He thinks Dish's decision recently to drop AMC and its sister channels including WE and IFC is a step in the right direction.

"It seems to us there is a big difference between AMC and its ratings and our ratings," Faber said. While noting that AMC has some critically acclaimed shows ("Mad Men," "Breaking Bad"), Faber said if a broadcast station got the ratings AMC gets on its most popular shows, it would be grounds for cancellation on broadcast TV.

"We're not asking for outrageous amounts of money," Faber said. "We're asking for rates that continue to be a bargain when you consider what they pay for other stuff."

Not helping the talks is Dish's new AutoHop commercial skipping device. Sinclair's Faber notes that if Dish wants to market a device that zaps commercials from its stations, it should expect the broadcaster to want some additional compensation.

Although the deadline for a new deal is still several hours away, neither side is optimistic. Viewers in Southern California will not be impacted by this spat. Most of Sinclair's stations are in the Midwest and Northeast.

ALSO:

CBS, NBC and Fox head to court over Dish's AutoHop

Cast of Modern Family strikes new deal

Olympic success lets NBC feel like winner again

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EXHIBIT 08

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